No. 96-8516

(10)

NOV 18 1997

CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

KENNETH E. BOUSLEY,
Petitioner,

v.

JOSEPH M. BROOKS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

RONALD H. WEICH
BONNIE I. ROBIN-VERGEER*
ZUCKERMAN, SPAEDER, GOLDSTEIN,
TAYLOR & KOLKER, L.L.P.
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 778-1800

DAVID M. PORTER
801 K Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

KYLE O'DOWD
1612 K Street, N.W., Suite 1400
Washington, D.C. 20006
(202) 822-6700

*Counsel of Record

23 pp

QUESTIONS PRESENTED

1. Does this Court's decision in *Bailey v. United States*, apply retroactively, so that a defendant who pled guilty to a charge of using a firearm in violation of 18 U.S.C. § 924(c) is entitled to collateral relief upon proof that he was not told that the facts of his case do not amount to "use" under § 924(c)?

2. Does a guilty plea waive the defendant's right to attack his conviction, where a subsequent change in the law makes the facts upon which the plea was based non-criminal?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

MISCELLANEOUS

INTERESTS OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit voluntary association of criminal defense lawyers founded in 1958 with a membership of more than 9,000 attorneys. NACDL is affiliated with 68 state and local criminal defense organizations with which it works cooperatively on issues related to criminal law and procedure, and thus, it speaks for more than 28,000 criminal defense lawyers nationwide. Among NACDL's objectives is to ensure the proper administration of criminal justice and to promote fair and consistent application of sentencing laws.

Families Against Mandatory Minimums Foundation ("FAMM") is a nonprofit, nonpartisan, educational association that conducts research and engages in advocacy regarding mandatory minimum sentencing laws. FAMM argues that such laws, of which 18 U.S.C. § 924(c) is a prominent example, are expensive and inefficient, perpetuate unwarranted and unjust sentencing disparities, and transfer the sentencing function from the judiciary to the prosecution. Founded in 1991, FAMM has 33,103 members nationwide with 36 chapters in 26 states and the District of Columbia. FAMM does not contend that crime should go unpunished, but that the punishment should fit the crime.

SUMMARY OF ARGUMENT

This case presents a question of exceptional importance to the administration of criminal justice—whether a federal prisoner must continue to serve a five-year mandatory prison term for conduct that subsequent legal developments establish

---

[1] In accordance with Supreme Court Rule 37.6, amici curiae represent that no party other than counsel for amici authored this brief in whole or in part, and no person or entity, other than amici, has made a monetary contribution to the preparation or submission of this brief. The petitioner and respondent have consented to the filing of this brief, and amici have filed the letters of consent with the Clerk of the Court, pursuant to Supreme Court Rule 37.3.

does not violate the statute under which he was convicted. Fundamental principles of justice and established precedent addressing the availability of collateral relief confirm that the prisoner's continued incarceration in such circumstances is insupportable.

At the time he pleaded guilty to the charge of "use" of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c), petitioner Kenneth Bousley, his counsel, the government, and the district court labored under the misimpression that the possession, storage, and availability of firearms in his bedroom near illicit drugs was sufficient to constitute "use" under the statute. In *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 506 (1995), this Court unanimously rejected that broad reading of the statute and held instead that the government must prove "active employment" of the firearm. In so ruling, the Court broke sharply with uniform case law in the courts of appeals. The existing record establishes on its face that there was no evidence of active employment of a gun in this case and that Bousley is innocent of the § 924(c) offense. Because his conviction and sentence were "imposed in violation of the Constitution or laws of the United States," 28 U.S.C. § 2255, collateral relief is both available and appropriate.

As this Court declared in *Davis v. United States*, 417 U.S. 333, 346 (1974), an intervening interpretation of substantive law that establishes that a federal prisoner's "conviction and punishment are for an act that the law does not make criminal," is retroactively available to the prisoner on collateral review, because such a circumstance "inherently results in a complete miscarriage of justice." The retroactivity doctrine announced by *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), does nothing to alter the result or analysis dictated by *Davis*.

The court of appeals erred in holding that Bousley's § 2255 motion was procedurally barred because of his failure to attack the validity of his § 924(c) conviction and sentence on

direct appeal. As a preliminary matter, procedural default analysis is inapposite. In contrast to other cases in which this Court has held that a prisoner had defaulted his claim, Bousley violated no specific procedural rule in failing to challenge his § 924(c) conviction on appeal. Bousley had no full and fair opportunity to challenge his § 924(c) conviction on direct appeal, as the *Bailey* decision was handed down more than five years after he pleaded guilty. A long and settled line of Eighth Circuit precedent precluded him from advancing on direct appeal the construction of § 924(c) that ultimately prevailed in *Bailey*. To require that to avoid a procedural bar, a prisoner must raise on direct appeal arguments explicitly rejected by controlling precedent would encourage frivolous appeals containing laundry lists of futile claims.

Even if his *Bailey* claim were subject to procedural default, Bousley has shown both cause and prejudice and, in the alternative, a miscarriage of justice justifying collateral review on the merits of his *Bailey* claim. Under *Reed v. Ross*, 468 U.S. 1 (1984), a petitioner establishes "cause" for a procedural default where, as here, a claim "is so novel that its legal basis is not reasonably available to counsel." *Id.* at 16. Moreover, as the government concedes, the Eighth Circuit erred in failing to consider whether Bousley was entitled to collateral review because "he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (citation omitted). Bousley's is an "extraordinary case," *id.* at 321, because the error "has probably resulted in the conviction of one who is actually innocent." *Id.* at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

Finally, the fact that Bousley pleaded guilty to "use" of a firearm under § 924(c) is no basis for denying him relief. Contrary to the view of the court of appeals, by pleading guilty the petitioner did not "waive" his right to challenge his conviction on collateral review. When, on the basis of an existing record, a prisoner asserts his right "not to be haled into

court at all" upon the charge to which he pleaded guilty, even a valid guilty plea will not stand in the way of his obtaining collateral relief. *United States v. Broce,* 488 U.S. 563, 575 (1989). In any event, Bousley's guilty plea was not valid. Because he mistakenly believed that he could be convicted of "use" of a firearm under § 924(c) even though he had not actively employed a firearm, his guilty plea was not knowing and voluntary and cannot withstand a collateral attack.

For this Court to deny prisoners on collateral review the right to avail themselves of *Bailey* because of the happenstance that their convictions had become final before *Bailey* was decided—at a time when settled circuit precedent prevented them from urging on direct appeal the construction of § 924(c) ultimately adopted by this Court—would be both unduly formalistic and manifestly unjust.

ARGUMENT

I. PURSUANT TO 28 U.S.C. § 2255, PETITIONER IS ENTITLED TO VACATUR OF HIS CONVICTION AND SENTENCE IMPOSED UNDER 18 U.S.C. § 924(C), AS THEY WERE BASED ON CONDUCT THAT IS NOT A CRIME.

Petitioner Kenneth Bousley stands convicted and is now serving a mandatory five-year sentence for an act that is not, according to this Court, a crime. Charged with "use" of a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c), Superseding Indictment, Count II, Bousley pleaded guilty to that count on the basis of his mere "ownership and possession" of firearms stored in his bedroom near the methamphetamine that he was charged with possessing with the intent to distribute. Plea Agreement, at 2; Transcript of Change of Plea Hearing, dated June 15, 1990, at 13 (petitioner's statement that he understood he was charged with "possession of a firearm"), 15. Five years later, in *Bailey v. United States,* 516 U.S. 137, 116 S. Ct. 501 (1995), this Court unanimously held that such conduct does not violate § 924(c).

There is no dispute that under *Bailey,* the mere possession, proximity to illicit drugs, or ready accessibility of a firearm to a person who commits a drug offense, is insufficient to constitute "use" within the meaning of § 924(c). *Bailey,* 116 S. Ct. at 506. To obtain a valid conviction for "use" under § 924(c), this Court held, the government must prove active employment of the firearm. *Id.* In so ruling, this Court broke sharply from existing case law, effectively overruling every court of appeals' precedent construing that aspect of the statute.

Section 2255 of Title 28 affords a collateral remedy for a federal prisoner asserting the right to be released upon the ground that his sentence "was imposed in violation of the Constitution or laws of the United States." Bousley rightfully maintains that his conviction and sentence for "use" of a firearm under § 924(c) were imposed in violation of the "laws of the United States" because, under *Bailey,* "use" under the statute requires more than mere ownership and possession, but also active employment of a firearm—conduct which the record reflects is entirely absent in this case.

A. Under *Davis v. United States,* Intervening Interpretations of Substantive Federal Law Apply Retroactively on Collateral Review.

1. In *Davis v. United States,* 417 U.S. 333, 346-47 (1974), this Court held that when, as here, a subsequent interpretation of substantive law reveals that a federal prisoner's conviction and punishment are for conduct that is not criminal, such a circumstance constitutes a "fundamental defect" that inherently results in a "complete miscarriage of justice" and justifies the grant of collateral relief. By ruling in favor of a prisoner whose conviction had become final, this Court necessarily also held that such an intervening change in federal law applied retroactively on collateral review.

The facts of *Davis* are analogous to those presented here. A selective service board had ordered Davis to report for

a physical examination. When he failed to appear, the board declared him a delinquent and subsequently accelerated his induction into the Armed Forces. Davis again failed to report, and as a result, was prosecuted and convicted for failure to comply with the Selective Service Act. *Id.* at 335-36. While Davis's direct appeal was pending, this Court decided *Gutknecht v. United States*, 396 U.S. 295 (1970), which held that the Selective Service regulations that accelerated the induction of delinquent registrants were punitive in nature and without legislative authorization. *Davis*, 417 U.S. at 337-38.

After *Gutknecht*, the Ninth Circuit remanded Davis's case to the district court for reconsideration, but the lower courts held that *Gutknecht* did not affect his conviction because Davis's induction had not in fact been accelerated because of his delinquency status. *Id.* at 338-39. While Davis's subsequent petition for certiorari was pending in this Court, the Ninth Circuit ruled in *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), that in light of *Gutknecht*, a registrant in the same position as Davis had been subject to the forbidden accelerated induction as a matter of law. This Court denied Davis's petition for certiorari. *Davis*, 417 U.S. at 340.

Thereafter, Davis filed a § 2255 motion in which he contended that the *Fox* decision changed the law of the Ninth Circuit after the affirmance of his conviction. This Court granted review after the court of appeals held that the decision on Davis's direct appeal constituted "the law of the case" and that Davis was therefore not entitled to avail himself of the change in law on collateral review. *Id.* at 341-42.

The *Davis* Court rejected the Ninth Circuit's reliance on the "law of the case," emphasizing that even when a legal issue raised in a § 2255 motion has been determined against the petitioner on a prior application or on direct appeal, the petitioner may nonetheless be entitled to relief "upon showing an intervening change in the law." *Id.* at 342 (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963)). Instead of relying on the finality of the conviction as reason to deny retroactive

application of an intervening interpretation of substantive law, the Court held that the "miscarriage of justice" standard enunciated in *Hill v. United States* governed the determination whether a prisoner would be entitled to invoke a change in law after his conviction had become final. Accordingly, the availability of relief turned on "whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'" *Davis*, 417 U.S. at 346 (quoting *Hill*, 368 U.S. 424, 428 (1962)).

The Court did not address whether *Fox* in fact established that Davis's induction order was invalid, but held that if it did, then Davis's "conviction and punishment are for an act that the law does not make criminal." In the Court's view, "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-47; *accord id.* at 347 (Powell, J., concurring in part and dissenting in part) (endorsing majority's holding that review under § 2255 was available to Davis "due to the intervening change in the law"). In so ruling, the Court necessarily resolved both the cognizability of Davis' claim in a § 2255 motion *and* the retroactivity of new interpretations of substantive criminal law that are sufficiently fundamental to the determination of guilt.

2. *Davis* remains good law and is directly controlling in this case. This Court held in *Bailey*, which was decided more than five years after Bousley pleaded guilty, that the mere possession, proximity to illicit drugs, and availability of a firearm were insufficient to support a conviction for "use" within the meaning of § 924(c). As a result, Bousley is now serving a prison term for a crime of which he is innocent. As in *Davis*, there is no "room for doubt" that Bousley's continued incarceration "inherently results in a complete miscarriage of

justice," a predicament that presents exceptional circumstances meriting collateral relief under § 2255.

With remarkable unanimity the courts of appeals have granted § 2255 relief after this Court (and in some instances, the courts of appeals) narrowed the reach of federal criminal statutes under which petitioners had been convicted when it was clear that the conduct underlying a conviction did not, in fact, violate the statute in question.[2] Consistent with that long-standing approach, the courts of appeals uniformly have accepted that a federal prisoner whose § 924(c) conviction became final before *Bailey* was decided asserts a cognizable claim for collateral relief if his conviction for "use" of a firearm was based on conduct that did not constitute a crime under

---

[2] For cases granting petitioners the benefit on collateral review of *Ratzlaf v. United States*, 510 U.S. 135 (1994) (holding that knowledge of illegality is an essential element of the crime of currency structuring), see, *e.g.*, *United States v. Brown*, 117 F.3d 471 (11th Cir. 1997); *Peck v. United States*, 73 F.3d 1220 (2d Cir. 1995), *vacated on other grounds*, 106 F.3d 450 (2d Cir. 1997); *United States v. Dashney*, 52 F.3d 298 (10th Cir. 1995).

For decisions applying *McNally v. United States*, 483 U.S. 350 (1987) (holding that the federal mail-fraud statute protects property rights, not the intangible right of the citizenry to good government), see, *e.g.*, *Borre v. United States*, 940 F.2d 215 (7th Cir. 1991); *Callanan v. United States*, 881 F.2d 229 (6th Cir. 1989), *cert. denied*, 494 U.S. 1083 (1990); *United States v. Mitchell*, 867 F.2d 1232 (9th Cir. 1989) (per curiam); *Dalton v. United States*, 862 F.2d 1307 (8th Cir. 1988); *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989); *United States v. Shelton*, 848 F.2d 1485 (10th Cir. 1988) (en banc); *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988).

For cases applying *United States v. Maze*, 414 U.S. 395 (1974) (holding that the mail-fraud statute did not reach mailings subsequent to the use of stolen or counterfeit credit cards), see, *e.g.*, *Strauss v. United States*, 516 F.2d 980 (7th Cir. 1975); *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974), and for those applying other intervening decisions narrowing the substantive reach of federal criminal statutes, see, *e.g.*, *Ianniello v. United States*, 10 F.3d 59 (2d Cir. 1993); *United States v. Sood*, 969 F.2d 774 (9th Cir. 1992); *United States v. McClelland*, 941 F.2d 999 (9th Cir. 1991).

Bailey.[3]

This is not to say that a federal prisoner automatically qualifies for collateral relief simply because his conviction or sentence was not imposed in strict compliance with a federal statute. The *Hill* fundamental defect/miscarriage of justice standard serves as both a critical bulwark against unjust convictions and as a substantial hedge against the risk that final convictions will be upset after minor judicial tinkering with federal law. Hence, many lapses in compliance with federal statutes and rules will not rise to the level of a miscarriage of justice.[4] Even substantive changes of law that have arisen since a prisoner's conviction has become final may be of insufficient significance to warrant relief from a final conviction. Wherever that line is drawn, however, Bousley's *Bailey* claim merits relief.

---

[3] *See, e.g.*, *Triestman v. United States*, 124 F.3d 361, 1997 U.S. App. LEXIS 22752 (2d Cir. 1997); *In re Hanserd*, 123 F.3d 922 (6th Cir. 1997); *Lee v. United States*, 113 F.3d 73 (7th Cir. 1997); *United States v. McPhail*, 112 F.3d 197 (5th Cir. 1997); *United States v. Barnhardt*, 93 F.3d 706 (10th Cir. 1996). *But see* Pet. App. 4 n.3 (rejecting Bousley's contention that *Davis* mandates success on his *Bailey* claim because Bousley, unlike Davis, had pleaded guilty and had not challenged his conviction on direct appeal).

[4] *See, e.g.*, *Reed v. Farley*, 512 U.S. 339, 341, 352-55 (1994) (state court's failure to observe 120-day rule of the Interstate Agreement on Detainers not a violation of federal law cognizable under § 2254 where the defendant did not object to the trial date when set and suffered no prejudice); *United States v. Timmreck*, 441 U.S. 780, 784-85 (1979) (§ 2255 relief unavailable to remedy a technical violation of Federal Rule of Criminal Procedure 11, at least where no "other aggravating circumstances" are present); *Hill v. United States*, 368 U.S. 424, 426, 429 (1962) (§ 2255 relief unavailable to redress a formal violation of Federal Rule of Criminal Procedure 32, at least when no "other aggravating circumstances" are present), *cf. United States v. Tucker*, 404 U.S. 443, 447 (1972) (ordering resentencing under § 2255 to permit trial judge to consider effect of the invalidity of petitioner's prior felony convictions, because "we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude").

This Court's decision in *United States v. Addonizio*, 442 U.S. 178 (1979), provides helpful guidance regarding when a subsequent change in federal law will be deemed sufficiently fundamental to justify collateral relief. In that case, three prisoners alleged that a change in the policies of the United States Parole Commission prolonged their imprisonment beyond the period intended by the sentencing judge. In each case, the judge imposed a sentence based in part on an understanding—subsequently rendered incorrect—that the prisoner would be released as soon as he became eligible for parole. *Id.* at 180-81.

In holding that the change in parole policy was not sufficiently fundamental to merit collateral relief under § 2255, the Court reasoned that there was "no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the 'fundamental' character that renders the entire proceeding irregular and invalid." *Id.* at 186. Whereas the change in Parole Commission policies in *Addonizio* "did not affect the lawfulness of the judgment itself—then or now," *id.* at 187, in *Davis*, by contrast, the subsequent development at issue "was a change in the substantive law that established that the conduct for which petitioner had been convicted and sentenced was lawful. To have refused to vacate his sentence would surely have been a 'complete miscarriage of justice,' since the conviction and sentence were no longer lawful." *Addonizio*, 442 U.S. at 186-87.

The same can be said for the judgment in this case. Both "then and now," Bousley's § 924(c) conviction was unlawful because, as this Court held in *Bailey*, the conduct for which he had been convicted—the storage of a firearm near illicit drugs—did not violate § 924(c). Although this Court's decision in *Bailey* was not announced until after Bousley's conviction became final, that decision spoke authoritatively as to what "use" under § 924(c) *always* properly meant. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994).

Bousley is innocent of that offense now and was equally innocent of the offense when he was convicted. To avoid a fundamental error rendering his conviction and sentence "irregular and invalid," Bousley's conviction and sentence under § 924(c) must be vacated.

B. *Teague v. Lane* is Inapposite.

In *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), this Court limited the enforceability of "new constitutional rule[s] of criminal procedure" in federal habeas corpus actions brought by state prisoners. *Id.* at 299. The retroactivity of *Bailey* is not squarely at issue in this case,[5] but if it were, the Court should find that *Bailey* applies retrospectively. *Teague* is inapposite for several reasons.

First, this Court developed the *Teague* doctrine in the context of state prisoners seeking federal habeas corpus relief pursuant to § 2254. The federalism and comity concerns that animate the *Teague* doctrine, *see id.* at 310, have little force in the context of a *federal* prisoner seeking relief from a *federal* court because of an intervening interpretation of *federal* law.

Second, even assuming *arguendo* that the *Teague* doctrine applies generally to federal prisoners seeking relief pursuant to § 2255, it does not limit the availability on collateral review of intervening substantive interpretations of federal criminal statutes. *Teague* and its forerunners restricted the retroactive enforceability only of "new constitutional rules of criminal *procedure*," *Id.* at 310 (emphasis added), not new "rules," or interpretations, delineating the *substance* of criminal federal statutes. *See Robinson v. Neil*, 409 U.S. 505, 508-09

---

[5] *See* Pet. App. 4 n.2 (holding that the "retroactive effect of *Bailey* is a distinct issue" from whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal); Brief for the United States on Petition for a Writ of Certiorari, at 11 n.6 (observing that the decision below did not address the "retroactivity" of *Bailey* and that there is no conflict among the circuits on that issue). *But see* Brief for the Petitioner on Petition for a Writ of Certiorari, at i (Questions Presented).

(1973) (distinguishing between substantive and procedural decisions because "[g]uarantees that do not relate to these procedural rules [procedural rights and methods of conducting trials] cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis"); *Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J.) (distinguishing between "procedural" and "substantive" rules for purposes of retroactivity analysis).

The rationale for the distinction is straightforward: with the exception of "watershed rules of criminal procedure," such as the right to counsel, which "significantly improve the pre-existing fact-finding procedures," *Teague*, 489 U.S. at 312, procedural rules governing "the use of evidence or . . . a particular mode of trial," *Robinson*, 409 U.S. at 508, affect only indirectly the integrity of the fact-finding process, the fundamental fairness of the trial, and the reliability of any ensuing conviction. New judicial constructions of the substance of federal criminal statutes, however, are of a different order of importance. A clear understanding of the conduct prohibited by a penal statute is essential to fair and effective law enforcement. Rulings such as *Bailey* that narrow the compass of federal statutes serve as a critical curb against a dragnet—such as was created in the overzealous prosecution of § 924(c) offenses—that ensnares the innocent alongside the guilty. In contrast to convictions obtained before a new rule of criminal procedure has been announced, convictions predicated on a misunderstanding of the scope of a federal criminal statute are not only unreliable—they are untenable.

Finally, even if the *Teague* doctrine applied, *Bailey* nonetheless would apply to federal prisoners seeking relief from their sentences in § 2255 motions. Under the first *Teague* exception, a new rule must be applied retroactively "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J.)); *see also Penry v. Lynaugh*, 492 U.S. 302, 331

(1989).[6]

The relevant precedent in deciding whether to afford retroactive application to federal prisoners seeking the benefit of a new interpretation of substantive criminal law under § 2255 is not *Teague*, but *Davis v. United States*, 417 U.S. 333, 344 (1974). If the intervening decision demonstrates that the prisoner's conviction and punishment are founded on a "fundamental defect" rising to the level of a "complete miscarriage of justice," the retroactivity inquiry is at an end, and the prisoner is entitled to avail himself of the new substantive decision. *Teague* did nothing to undermine the continued vitality of this Court's decision in *Davis*. For that reason, the courts of appeals have adopted the distinction between new substantive and procedural decisions, unanimously agreeing that the *Bailey* decision applies retroactively to § 2255 motions.[7]

---

[6] In explaining the first exception in *Mackey*, Justice Harlan stated that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose," *Mackey*, 401 U.S. at 693. "In general, the first exception may be interpreted as distinguishing new rules of substantive criminal law, which always apply retroactively, from new rules of criminal procedure, which generally do not apply retroactively in cases that were final as of the time the new rule was announced." 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.7, at 794 (2d ed. 1994); *cf. Gilmore v. Taylor*, 508 U.S. 333, 345 (1993) (new rule did not satisfy the first exception because it did not "decriminalize" any class of conduct).

[7] *See, e.g., Triestman v. United States*, 124 F.3d 361, 1997 U.S. App. LEXIS 22752, at *20 n.7 (2d Cir. 1997); *United States v. Barnhardt*, 93 F.3d 706, 709 (10th Cir. 1996); *Stanback v. United States*, 113 F.3d 651, 654 n.2 (7th Cir. 1997); *United States v. McPhail*, 112 F.3d 197, 199 (5th Cir. 1997); *see also United States v. Cota-Loaiza*, 936 F. Supp. 751, 753-54 (D. Colo. 1996) (collecting cases). *But see Price v. United States*, 959 F. Supp. 310, 315 (E.D. Va. 1997).

II. PETITIONER'S *BAILEY* CLAIM IS NOT PROCEDURALLY BARRED, BUT IF IT WERE, HE COULD DEMONSTRATE "CAUSE" AND "PREJUDICE" AND/OR A "MISCARRIAGE OF JUSTICE" EXCUSING ANY DEFAULT.

The court of appeals erred in holding that petitioner Kenneth Bousley's § 2255 motion was procedurally barred because of his failure to attack the validity of his § 924(c) conviction and sentence on direct appeal. *See* Pet. App. 3.[8]

A. Procedural Default Analysis is Inapplicable.

As a preliminary matter, procedural default analysis does not apply when a defendant asserts a claim for the first time in a § 2255 motion, unless a specific applicable procedural rule required the defendant to raise that claim at an earlier point in time. There was no such procedural rule requiring Bousley to challenge on appeal his conviction for "use" of a firearm under § 924(c), years before he had any legal basis for making that challenge. Indeed, such a procedural requirement would be misplaced when, as here, the basis urged for vacating a conviction and sentence was specifically *precluded* by controlling, crystallized case law at the time the conviction became final. Under such circumstances, in which a prisoner never had a full and fair opportunity to litigate his claim prior to filing his § 2255 motion, the claim is not procedurally barred.

---

[8] The court of appeals relied in part on a faulty premise—its decision in *United States v. McKinney*, 79 F.3d 105, 109 (8th Cir. 1996) (holding on direct appeal that the defendant had waived his right to invoke *Bailey* because he did not preserve the issue at trial), *vacated*, 117 S. Ct. 1816 (1997), which it cited for the proposition that "*Bailey* does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted." Pet. App. 3 & n.2. This Court vacated that decision and remanded for reconsideration in light of *Johnson v. United States*, 117 S. Ct. 1544 (1997), and on remand, the Eighth Circuit reversed McKinney's § 924(c) conviction. 120 F.3d 132 (8th Cir. 1997).

1. In contrast to other situations in which this Court has held that a prisoner had defaulted his claim, Bousley violated no specific procedural rule in failing to challenge his § 924(c) conviction on direct appeal under the peculiar circumstances presented here. As this Court explained in *Coleman v. Thompson*, 501 U.S. 722, 729-31 (1991), the procedural default doctrine is merely a means of respecting "adequate and independent state grounds"—such as the failure to observe a contemporaneous-objection rule—for a state court's refusal to grant a defendant relief from a conviction. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72 (1977). While in certain circumstances this Court has imposed the "cause and prejudice" standard on federal prisoners as well, *see United States v. Frady*, 456 U.S. 152 (1982); *Davis v. United States*, 411 U.S. 233 (1973), the logic and holdings of these precedents do not apply to a federal prisoner in Bousley's position. As *Frady* and *Davis* make clear, the "cause and prejudice" standard applies only to cases in which the petitioner has defaulted a claim by failing to adhere to a particular procedural rule in place at the time of his conviction.[9]

In *Frady*, for example, the petitioner alleged that the trial court had erroneously instructed the jury. He raised the claim for the first time in his § 2255 motion. Because Frady had failed to comply with Rule 30 of the Federal Rules of Criminal Procedure, which required a party to raise any objections to jury instructions "before the jury retires to consider its verdict," this Court held that he had procedurally defaulted his claim. *See Frady*, 456 U.S. at 162-64. Similarly,

---

[9] *See English v. United States*, 42 F.3d 473, 474, 489-479 (9th Cir. 1994) (holding that federal prisoners had not defaulted their claims based on *Gomez v. United States*, 490 U.S. 858 (1989), by raising them for the first time in § 2255 motions, because "there was no rule requiring the petitioners to raise their *Gomez* claim on direct appeal"); *United States v. Corsentino*, 685 F.2d 48, 50 (2d Cir. 1982) (finding no procedural default because "no rule of federal procedure obliges a defendant to make a contemporaneous objection when a prosecutor violates the terms of a plea agreement").

in *Davis*, the prisoner raised for the first time in his § 2255 motion a claim of unconstitutional discrimination in the composition of the grand jury that indicted him. Because Federal Rule of Criminal Procedure 12(b)(2) required that "objections based on defects in the institution of the prosecution or in the indictment" must be raised "by motion before trial" upon penalty of waiver, the Court held that Davis's claim was procedurally barred, absent a showing of cause and actual prejudice. *Davis*, 411 U.S. at 236-37.

By contrast, no procedural rule required Bousley to attack his conviction and sentence under § 924(c) on direct appeal years before *Bailey* was decided. Indeed, in light of the fact that Bousley pleaded guilty to the § 924(c) offense, Eighth Circuit precedent suggested the *opposite*: In the Eighth Circuit, claims challenging the voluntariness of a guilty plea, like claims of ineffective assistance of counsel, must first be presented to the district court and are not cognizable on direct appeal, because of the possibility that such claims will require the development of facts outside the record.[10] That Bousley's § 2255 motion attacked the knowing and voluntary nature of his guilty plea is all the more reason for this Court to decline to find that he violated an applicable procedural rule.

2. Nonetheless, it is conventional wisdom that "[s]o far as convictions obtained in the federal courts are concerned, the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Sunal v. Large*, 332 U.S. 174, 178 (1947); *see also Frady*, 456 U.S. at 165; *United States v. Addonizio*, 442 U.S. 178, 184 (1979); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 274 (1942). These decisions, however, do not demand that Bousley

[10] *See, e.g., United States v. Young*, 927 F.2d 1060, 1061 (8th Cir.), *cert. denied*, 502 U.S. 943 (1991); *United States v. Murphy*, 899 F.2d 714, 716 (8th Cir. 1990); *United States v. Ulland*, 638 F.2d 1150, 1150 (8th Cir. 1981) (per curiam); *United States v. Mims*, 440 F.2d 643, 644 (8th Cir. 1971) (per curiam).

prognosticate subsequent changes in the law that constitute a sharp departure from precedent settled during the time for taking a direct appeal.

This Court acknowledged this distinction in *Sunal*. In denying a writ of habeas corpus to federal petitioners despite two intervening favorable Supreme Court decisions, *Estep v. United States* and *Smith v. United States*, 327 U.S. 114 (1946), which established that the trial courts had erred in denying the petitioners a particular defense, the *Sunal* Court held the claims barred because "[a]ppeals could have been taken in these cases, but they were not." *Sunal*, 332 U.S. at 177 (footnote omitted). The petitioners argued that since the state of the law made the appeals seem "futile," it would be unfair to deny the petitioners relief because of their failure to appeal. The Court rejected that argument, but only because the Court was not convinced that an appeal raising the arguments that ultimately prevailed in the subsequent Supreme Court decisions would, in fact, have been futile. At the time the defendants in *Sunal* were convicted, *Estep* and *Smith* were pending before the appellate courts; indeed, the same counsel represented the defendants in *Sunal* as in *Estep* and *Smith*. "The same road was open to Sunal and Kulick as the one Smith and Estep took." *Id.* at 181. The Court stressed: "The case, therefore, is *not one where the law was changed after the time for appeal had expired*." *Id.* (emphasis added). "It is rather a situation where at the time of the convictions the definitive ruling on the question of law had not crystallized." *Id.*; *cf. Sanders v. United States*, 373 U.S. 1, 17 (1963).

Bousley's plight at the time he was convicted and sentenced in 1990 was entirely different from that of the prisoners in *Sunal*. For him, controlling law had "crystallized," establishing beyond peradventure (erroneously, as it turns out) that possession of a firearm was sufficient to constitute "use" under § 924(c) where the firearm was "present" and "available"

to the defendant to protect his drug enterprise.[11] In fact, as the Solicitor General pointed out in the government's brief submitted in *Bailey*, "all" of the courts of appeals routinely affirmed convictions under § 924(c)(1) without proof of "actively using the firearm in any way." Brief for the United States, at 16 n.4, *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501 (1995) (Nos. 94-7448 and 94-7492); *see also id.* at 32 & n.12. Thus, the *Sunal* bar on raising claims in a § 2255 motion that could have been raised on direct appeal, does not apply.[12]

3. To apply procedural default analysis to a petitioner in Bousley's predicament not only would be unfair to Bousley, who surely cannot be faulted for failing to predict that a solid wall of circuit authority would be overturned by this Court, but also unwise inasmuch as it would cause an unnecessary drain on judicial resources. As noted above, if in 1990, Bousley had challenged on appeal his conviction and sentence on the ground that there was no evidence of "active employment" of a firearm, his argument would have been

---

[11] *See, e.g., United States v. Young-Bey*, 893 F.2d 178, 181 (8th Cir. 1990) (finding it sufficient that the firearms were "readily accessible" to protect and facilitate the drug enterprise); *United States v. La Guardia*, 774 F.2d 317, 321 (8th Cir. 1985) ("Section 924(c)(1) reaches the possession of a firearm which in any manner facilitates the execution of a felony"; "[t]he presence and availability in light of the evident need demonstrates the use of a firearm to commit the felony.").

[12] The *Sunal* rule does apply, however, to a defendant who had the opportunity to raise *Bailey* before his conviction became final, but failed to do so. Similarly, the *Sunal* rule may apply when a federal prisoner raises a claim for the first time in a § 2255 motion where the law had not yet crystallized to the point that advancing his claim on appeal would have been an exercise in futility. *See, e.g., United States v. Osser*, 864 F.2d 1056, 1061 (3d Cir. 1988) (denying writ of error coram nobis urging application of *McNally* because at the time of Osser's trial in 1972, there was no "entrenched precedent" that would have rendered a direct appeal on the mail-fraud point futile).

branded frivolous, as it was clearly precluded by a long line of Eighth Circuit precedent. That Bousley had *pleaded guilty* to the § 924(c) offense would have made any such challenge on appeal all the more untenable before *Bailey* was decided. For these reasons, Bousley did not have a full and fair opportunity to litigate his challenge to his § 924(c) conviction. *Cf. Stone v. Powell*, 428 U.S. 465 (1976).

To hold that Bousley nonetheless was required to advance such a futile claim on appeal or face procedural default would effectively oblige defendants to submit endless laundry lists of pointless claims on appeal in the desperate hope that some day, one of those claims might prove meritorious as a result of an unpredicted change in law. That would be a regrettable waste of the scarce resources of both the litigants and the courts.

This Court's recent decision in *Johnson v. United States*, 117 S. Ct. 1544 (1997), albeit a plain-error case, lends further credence to the notion that Bousley and other prisoners in his position have not defaulted their *Bailey* claims by failing to raise pointless arguments on direct appeal. In *Johnson*, the government argued that for an error to be deemed "plain" or "obvious," for purposes of the second prong of the plain-error standard, it must have been so both at the time of trial and at the time of appellate consideration. Accordingly, the government contended, the defendant should have objected at trial to the court's deciding the issue of materiality, even though near-uniform precedent both from the Supreme Court and from the courts of appeals had held that course proper. *Id.* at 1549. This Court declined to impose such an onerous and wasteful burden upon defendants:

> Petitioner, on the other hand, urges that such a rule would result in counsel's inevitably making a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent. We agree with petitioner on this point, and hold that in a case such as

> this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be "plain" at the time of appellate consideration.

Id. By the same token, where, as here, clear and controlling precedent would preclude a particular claim if raised on appeal, a petitioner may properly raise the claim based on intervening law for the first time in a § 2255 motion without fear of procedural default.[13]

If anything, this Court has frequently referred to the *Sunal* rule that a collateral attack will not "do service for an appeal," not so much as justification for denying the petitioner the right to *raise* his claim in a § 2255 motion, but as reason for the stricter standard set for actually *obtaining* collateral relief. *See, e.g., United States v. Addonizio,* 442 U.S. 178, 184 (1979) ("It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment."). Regardless of whether a defendant has defaulted his claim by raising it for the first time in a § 2255 motion, that claim may not be cognizable under § 2255 because it is not based on a "fundamental defect" rising to the level of a "complete miscarriage of justice." *See, e.g., id.* at 186-88; *see also* Part I, Section A(2) & cases cited in n.4, *supra.* The governing standard for when an intervening interpretation of law is sufficiently fundamental to be cognizable under § 2255 is supplied by *Davis v. United States,* 417 U.S. 333 (1974), and its progeny, however, and not by the rules governing procedural default.

---

[13] *See also Ingber v. Enzor,* 841 F.2d 450, 454-55 (2d Cir. 1988) ("Were we to penalize Ingber for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court. Such a rule would encourage appeal of even well-settled points of law. We see no value in imposing a responsibility to pursue such a 'patently futile' course."); *English v. United States,* 42 F.3d 473, 479 (9th Cir. 1994).

B. Petitioner Has Shown "Cause and Prejudice" and a "Miscarriage of Justice."

Even assuming that his *Bailey* claim is subject to procedural default, Bousley easily satisfies the "cause and prejudice" standard for excusing such a default. Alternatively, his claim establishes the requisite miscarriage of justice justifying review on the merits of his claim, regardless of the existence of cause and prejudice.

1. In finding that Bousley failed to show "cause" for his default, the court below overlooked the most obvious "cause" for Bousley's failure to assert on direct appeal that his conviction was invalid—that is, that Bousley's *Bailey* claim was "so novel that its legal basis [was] not reasonably available to counsel." *Reed v. Ross,* 468 U.S. 1, 16 (1984). Counsel lacks a "reasonable basis" upon which to develop a legal theory when, as here, a decision of this Court overturns "a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Id.* at 17.

This Court's interpretation of § 924(c) in *Bailey* was not reasonably available to Bousley during the period for taking a direct appeal. In light of the substantial body of adverse precedent law in his own circuit and the dearth of favorable case law on which to rely from other jurisdictions, *see* Part II, Section A, *supra,* Bousley lacked the tools with which to construct his present claim and accordingly, has shown "cause" for his failure to do so. *Cf. Engle v. Isaac,* 456 U.S. 107, 131-33 (1982) (concluding that the state prisoner had the necessary tools to assert his claim and for that reason, had failed to demonstrate "cause"). It is not simply a matter of whether *Bailey* would have made counsel's task "easier," but rather, that before *Bailey,* the claim was not "available" at all. *Smith v. Murray,* 477 U.S. 527, 537 (1986). The court of appeals below offered no explanation for its failure to find "cause" in spite of *Reed,* its own case law to the contrary, *e.g., Dalton v. United States,* 862 F.2d 1307, 1310 (8th Cir. 1988), and the substantial

body of decisions from other jurisdictions that have relied on *Reed* to reach the merits of *Bailey* claims on collateral review.[14]

Manifestly, Bousley also demonstrates actual prejudice. His inability to predict this Court's construction of § 924(c) in *Bailey* led directly to his conviction and sentence on a record that reflected neither the requisite "active employment" of a firearm nor the required understanding of the elements of the offense. *See United States v. Frady*, 456 U.S. 152, 172 (1982) (explaining that "prejudice" is satisfied if it appears that the error created a "substantial likelihood" that the result otherwise would have been different).

2. Alternatively, as the government concedes, the Eighth Circuit erred in failing to consider whether Bousley was entitled to collateral review because "he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (citation omitted); *see* Brief for the United States on Petition for a Writ of Certiorari, at 10-11. To show that his is the "extraordinary case" meriting relief, *Schlup*, 513 U.S. at 321, Bousley must show that constitutional error "has probably resulted in the conviction of one who is actually innocent." *Id.* at 327 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Devoid as it is of any suggestion that Bousley actively employed a firearm, the record in this case demonstrates on its face that Bousley satisfies this narrow exception. Even the Eighth Circuit (when ordered to reconsider the matter by this Court) has recognized, albeit in a plain-error case, that a conviction predicated on an incorrect understanding of the definition of "use" under § 924(c) gives rise to a miscarriage of justice "because it resulted in the conviction of a person who was not guilty of the crime with which he was charged."

---

[14] *See, e.g., Triestman v. United States*, 124 F.3d 361, 1997 U.S. App. LEXIS 22752, at *21 n.8 (2d Cir. 1997); *United States v. Holland*, 116 F.3d 1353, 1356 (10th Cir.), *cert. denied*, 66 U.S.L.W. 3262 (U.S. 1997); *Abreu v. United States*, 911 F. Supp. 203, 207 (E.D. Va. 1996).

United States v. McKinney, 120 F.3d 132 (8th Cir. 1997); *see also* Part I, Section A, *supra*.

Accordingly, Bousley is entitled to consideration on the merits of his § 2255 claim regardless of whether he has shown sufficient "cause" for any default.

III. THAT PETITIONER WAS CONVICTED BY MEANS OF A GUILTY PLEA DOES NOT AFFECT THE VIABILITY OF HIS CLAIM.

Finally, the fact that Bousley pleaded guilty to "use" of a firearm under § 924(c) is no basis for denying him relief. Contrary to the view of the court below, by pleading guilty the petitioner did not "waive" his right to challenge his conviction on collateral review. To convict and punish a defendant for conduct that is not a crime constitutes a most basic denial of due process, one that our laws and judicial system will not countenance, regardless of whether the conviction is procured by verdict or by plea. When, on the basis of an existing record, a prisoner asserts his right "not to be haled into court at all" upon the charge to which he pleaded guilty, even a valid guilty plea will not stand in the way of his obtaining relief. In any event, as Bousley maintains, his guilty plea was not valid.

A. A Conviction and Sentence Based on Even a Valid Guilty Plea Should Be Vacated If Based on Conduct That the Law Does Not Make Criminal.

In one of the Court's more recent pronouncements on the availability of collateral relief from a conviction secured by a guilty plea, this Court held that the petitioners were not entitled to assert double jeopardy claims in a collateral attack upon their convictions, where they could not prove their claim by relying on the indictments and the existing record. *United States v. Broce*, 488 U.S. 563, 576 (1989). Both the outcome and reasoning of *Broce* are readily distinguishable from Bousley's claim that on the face of the existing record and as a matter of law, he is innocent of the crime to which he pleaded

guilty.

This Court explained in *Broce* that because "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence," a prisoner who seeks to reopen the proceedings after pleading guilty is "ordinarily" confined to challenging whether the underlying plea was "both counseled and voluntary." *Id.* at 569. In this case, however, the Court need not determine that Bousley's plea was invalid (because involuntary or uncounseled), as a prerequisite to granting him collateral relief. *Broce* did not address the situation present here, in which a subsequent controlling decision interpreting the statute of conviction establishes that on the *face of the existing record* the defendant's conviction is for conduct that the law does not make criminal.

In both *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), the Court recognized that defendants who plead guilty do not thereby waive the right to attack their convictions on grounds that implicate the court's power to enter the conviction or impose the sentence in the first place. In *Broce*, the Court affirmed the continued validity of that exception. 488 U.S. at 574-76. Because "on the face of the record, the court had no power to enter the conviction or impose the sentence," *id.* at 569, Bousley is entitled to vacation of his § 924(c) conviction and sentence regardless of the validity of the underlying plea.

In *Blackledge*, the Court granted a writ of habeas corpus sought by a state prisoner who had pleaded guilty to a felony indictment filed after the prisoner had exercised his right to appeal de novo his misdemeanor conviction for the very same conduct. The Court held that the state's action in filing a felony indictment in these circumstances created a potential for vindictiveness that was inconsistent with the dictates of due process. 417 U.S. at 28-29. The Court held that Perry's guilty plea did not waive his due process challenge to the conviction. In so ruling, the Court distinguished its refusal to entertain the

defendants' claims attacking their guilty pleas in *Tollett v. Henderson*, 411 U.S. 258 (1973), and in the *Brady* trilogy,[15] because unlike those defendants, Perry was "not complaining of 'antecedent constitutional violations' or of a 'deprivation of constitutional rights that occurred prior to the entry of the guilty plea.' Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge." *Blackledge*, 417 U.S. at 30 (quoting *Tollett*, 411 U.S. at 266, 267).

Similarly, in *Menna*, the defendant sought to set aside his conviction, notwithstanding his guilty plea, because the Double Jeopardy Clause precluded his conviction altogether. This Court agreed, ruling that where the government is precluded from "haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." 423 U.S. at 62. The Court did not rule that a double jeopardy claim may never be waived, but held simply "that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Id.* at 62 n.2.

A comparison of the results in *Menna* and *Broce* is instructive. In both cases, the defendants pleaded guilty and thereafter sought to set aside their convictions on double jeopardy grounds. The defendant in *Menna* was successful because the record established on its face that the Double Jeopardy Clause barred the defendant's prosecution. As the Court explained in *Broce*, in neither *Blackledge* nor *Menna* did the defendants seek further proceedings at which to expand the record with new evidence. In both cases, the existing record was sufficient to demonstrate that the defendants' claims were meritorious. *Broce*, 488 U.S. at 575. In *Blackledge*, "the

---

[15] *See Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

concessions implicit in the defendant's guilty plea were simply irrelevant," while in *Menna*, the indictment was "facially duplicative" of the earlier offense of which the defendant had been convicted and sentenced. *Id.*

By contrast, the petitioners in *Broce* pleaded guilty to indictments that on their face described separate conspiracies, and thus they could not prove their double jeopardy claim "by relying on those indictments and the existing record." *Id.* at 576. Indeed, the petitioners in *Broce* could not have prevailed "without contradicting those indictments," a course of action precluded by the admissions inherent in their guilty pleas. *Id.*

The exception outlined in *Broce*, *Menna*, and *Blackledge* is fully applicable here. Bousley's claim rests entirely on the *existing* record, chiefly the plea agreement and plea colloquy, which establish that the plea was based on Bousley's ownership and possession of firearms and not on any evidence of active employment. Thus, there is no need to conduct further proceedings to develop evidence outside the record; the record speaks for itself. As in *Blackledge*, "the concessions implicit in the defendant's guilty plea"—*i.e.*, that Bousley "possessed" the firearms and that they were "available"—were "simply irrelevant," *Broce*, 488 U.S. at 575, to the question whether Bousley was guilty of having "used" a firearm in violation of § 924(c).

In pleading guilty, Bousley may have waived a challenge to the facts themselves, but he did not waive his right to contest whether those facts were sufficient to constitute a crime.[16] "[N]o matter how validly his factual guilt [was] established," *Menna*, 423 U.S. at 62 n.2, a petitioner's guilty plea does not waive a claim that his conviction is unconstitutional "if the facts he pled guilty to are subsequently

[16] *Lee v. United States*, 113 F.3d 73, 75 (7th Cir. 1997) (granting collateral relief based on *Bailey*, notwithstanding guilty plea); *accord Stanback v. United States*, 113 F.3d 651, 655 (7th Cir. 1997) (same).

determined not to be criminal." *United States v. Barnhardt*, 93 F.3d 706, 708 (10th Cir. 1996) (*Bailey* claim may be raised in a § 2255 motion despite guilty plea).[17] Indeed, the federal courts historically have voided convictions when this type of fundamental defect has arisen. *See, e.g., Mossew v. United States*, 266 F. 18, 20 (2d Cir. 1920) ("We are of the opinion that no crime is charged in this indictment. Therefore the conviction, even though upon plaintiff in error's plea of guilty, is void."); *cf. Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 178 (1874) (granting writ of habeas corpus where the sentence of the circuit court was "pronounced without authority").

Bousley's continued incarceration for an offense of which he is innocent violates the most basic principles of substantive[18] and procedural[19] due process. Incarceration of an innocent individual likewise constitutes "cruel and unusual

[17] *Accord United States v. Andrade*, 83 F.3d 729, 731 (5th Cir. 1996); *United States v. Farley*, No. 96-3002, 1996 U.S. App. LEXIS 24208, at *8 (6th Cir. Aug. 27, 1996) (per curiam); *see also United States v. Caperell*, 938 F.2d 975, 977-78 (9th Cir. 1991); *United States v. Barboa*, 777 F.2d 1420, 1422-23 & n.3 (10th Cir. 1985).

[18] *See United States v. Briggs*, 939 F.2d 222, 228 (5th Cir. 1991) ("Simply put, to convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution."); *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986) ("To punish a person criminally for an act that is not a crime would seem the quintessence of denying due process of law. . . ."); *cf. Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . .") (citing *North Carolina v. Pearce*, 395 U.S. 711, 738 (1969) (Black, J.)).

[19] *See Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) ("Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt") (footnote and citations omitted); *see also Jackson v. Virginia*, 443 U.S. 307 (1979); *Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974) (per curiam); *In re Winship*, 397 U.S. 358 (1970).

punishment" under the Eighth Amendment, for such infliction of unnecessary and unjustified suffering is "inconsistent with contemporary standards of decency."[20]

The government has no legitimate penal interest in continuing to imprison Bousley for his conduct, and accordingly, Bousley's conviction and sentence under § 924(c) should be vacated.

B. Petitioner's Guilty Plea Was Invalid.

Although this Court should remand this case for vacatur of Bousley's conviction and sentence without regard to the validity of his guilty plea, Bousley is correct in suggesting that his plea in fact was not knowing and voluntary. The government agrees. *See* Brief for the United States on Petition for a Writ of Certiorari, at 8-9.

This Court has explained that a plea may be involuntary because the defendant "has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this . . . sense." *Henderson v. Morgan*, 426 U.S. 637, 645 (1976); *accord Marshall v. Lonberger*, 459 U.S. 422, 436 (1983); *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) (a guilty plea cannot be truly voluntary "unless the defendant possesses an understanding of the law in relation to the facts").

Accordingly, the voluntariness requirement is not satisfied unless the defendant has "received 'real notice of the true nature of the charge against him.'" *Henderson*, 426 U.S. at 645 (citation omitted). For that reason, the Court in *Henderson* affirmed the grant of a writ of habeas corpus where the

[20] *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

petitioner had not been informed that intent to cause death to the victim was an element of the offense. *Id.* at 645-46. Similarly, because the plea colloquy reflects that Bousley incorrectly believed that he could be convicted under § 924(c) based solely on his "possession" of a weapon, Transcript, at 3, his guilty plea clearly was not "voluntary in a constitutional sense," *Henderson*, 426 U.S. at 645, and cannot withstand collateral attack. *See Kercheval v. United States*, 274 U.S. 220, 224 (1927) ("[T]he court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence.").

Of course, not every guilty plea that is based on a misapprehension of the governing law must be vacated. *Compare Brady v. United States*, 397 U.S. 742, 757 (1970) (refusing to disturb a guilty plea that was based on a mistaken fear that the death penalty was available). Brady's claim that his plea was involuntary rested solely upon his misunderstanding of the anticipated *costs* of not pleading guilty. In *Brady*, however, unlike here, the defendant had been adequately and accurately informed of the elements of the charged offense. Brady's "strategic miscalculations concerning the evidentiary strength of the government's case or concerning the penalties that may be imposed upon conviction . . . did 'not impugn the truth or reliability of his plea.'" *United States v. Brown*, 117 F.3d 471, 478 (11th Cir. 1997) (quoting *Brady*, 397 U.S. at 757).[21]

By contrast, Bousley's guilty plea itself is wholly

[21] By the same token, the fact that a defendant may plead guilty and consent to punishment despite his claim of innocence, *see North Carolina v. Alford*, 400 U.S. 25 (1970), is no reason to permit Bousley's conviction to stand. "Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice," even an *Alford* plea may not be accepted "unless there is a factual basis for the plea." *Id.* at 38 n.10. There is no such factual basis here. And of course, an individual entering an *Alford* plea must "voluntarily, knowingly, and understandingly" consent to punishment, *id.* at 37; Bousley did not.

unreliable. That the guilty plea and plea agreement were the product of "negotiation and concession," as the court of appeals put it, Pet. App. 4,[22] is no reason to refrain from scrutinizing the validity of the plea. While this Court frequently has recognized the importance of plea bargaining to the administration of justice, *see Santobello v. New York*, 404 U.S. 257, 260 (1971), the mere existence of a plea agreement cannot foreclose a challenge to a conviction and sentence that were not authorized by the criminal statute under which a defendant has been convicted or that were procured by an involuntary plea.

Thus, Bousley's guilty plea—whether valid or not—does not bar him from obtaining relief pursuant to § 2255 to remedy this fundamental miscarriage of justice.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

DAVID M. PORTER
801 K Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

RONALD H. WEICH
BONNIE I. ROBIN-VERGEER*
ZUCKERMAN, SPAEDER, GOLDSTEIN
TAYLOR & KOLKER, L.L.P.
1201 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 778-1800

KYLE W. O'DOWD
1612 K Street, N.W., #1400
Washington, D.C. 20006
(202) 822-6700

*Counsel of Record

---

[22] The court noted that in exchange for his plea of guilty, Bousley was afforded the "opportunity" to contest at sentencing the amount of drugs for which he would be held accountable. Pet. App. 4. This was hardly a "concession," *id.*, for even a defendant who pleads guilty is entitled to have the court determine the appropriate sentence.